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On Petition for Rehearing from the Circuit Court of Appeals [illegible]

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BRIEF FOR PETITIONERS.

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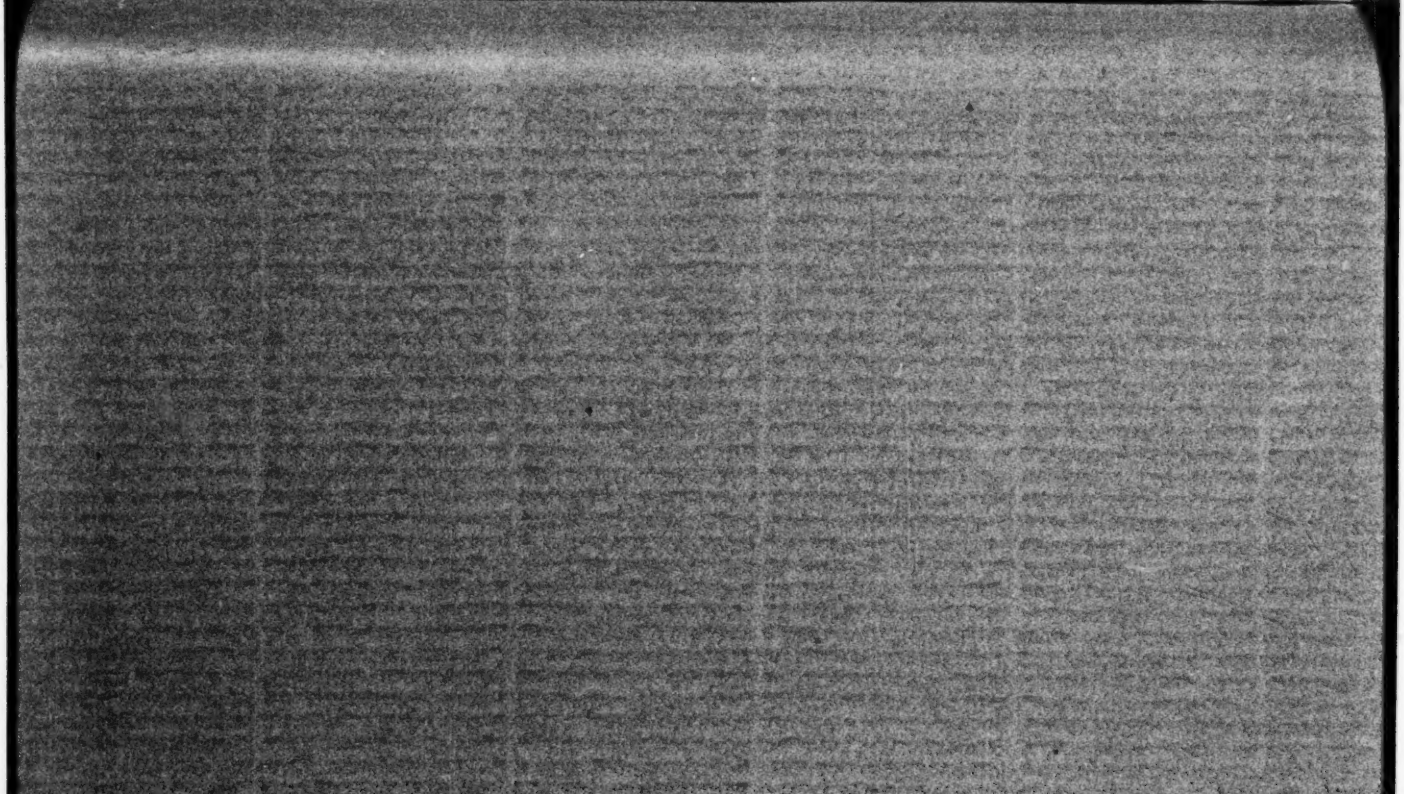

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO.....

THE HARTFORD FIRE INSURANCE COMPANY, ET AL.,

Plaintiffs in Error,

vs.

THE CHICAGO MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Defendant in Error.

BRIEF IN SUPPORT OF THE PETITION OF THE HARTFORD FIRE INSURANCE COMPANY, ET AL, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF FACTS.

The references are to the certified transcript of record in the Circuit Court of Appeals for the Eighth Circuit herewith submitted. Copies of the opinions in that Court are annexed to the petition herein as well as to the record itself.

February 1, 1890, Simpson, McIntire & Co entered into a contract of lease with the Chicago, Milwaukee & St. Paul Ry. Co. for a tract of ground, a portion of the station yards of the railway company at Monticello, Iowa, which lease contained the following clause:

"To hold, for the term of one year from the date hereof, for the purpose of erecting and maintaining thereon a cold storage warehouse, the said lessee yielding and paying therefor the annual rent of five dollars, in advance, and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and

persistently refuse to furnish the elevators for grain, and cold storage warehouses for perishable food products, which are absolutely requisite for receiving and transporting these classes of property which the railways hold themselves out as carriers of, and which constitute an enormous mass of commerce from which they derive a large part of their revenues.

By refusing to furnish such facilities, can the railway companies impose new burdens and risks upon the public and upon their patrons, by requiring them to submit to having their property, which is the subject of carriage and commerce, and the facilities for handling it, which they are compelled to furnish, destroyed by the negligence of the carrier in setting fire to it?

If the railway companies furnished these warehouses themselves, as is their duty to do in order that their patrons may have adequate facilities, they would then clearly fall within the rule laid down by an elementary writer. "But, if they combine the two characters, treating the deposit with them as being merely for the convenience of further carriage, or *to encourage or promote their business as common carriers*, they will be held to strict liability as such from the time of delivery to them. *In such cases the deposit is a mere accessary to the carriage, and for the purpose of facilitating it. The liability of the carrier begins with the receipt of the goods.*"

Hutchinson on Carriers, 2 Ed. by Mechem, Sec. 62.

The carrier could not, in such case, screen himself from liability for his negligent destruction by fire of the goods in his own warehouse. A railway company cannot do that in any case where goods are stored in its own warehouse. How then can a railway company compel its patrons to furnish the warehouses which it ought to furnish itself, and because they have done this, then compel them to submit to the risk of having not only the warehouses thus furnished, but the grain and perishable foods stored in them for carriage, destroyed by the negligence of it and its servants?

JUDICIAL NOTICE BY COURT.

That the railway companies, over a great area of country, do compel their patrons to furnish grain elevators and cold storage warehouses, is a matter of common observation and knowledge, and is witnessed by many decisions of courts of last resort. Thus, in Iowa, a railway which destroys one of these grain elevators by its negligence in setting fire thereto, is held liable to the owner of wheat stored therein by arrangement with the proprietor of the elevator.

In that case the Supreme Court of Iowa said: "While it is true, as claimed by appellant, that the court cannot take judicial notice of a custom to mix and mingle such property by warehousemen, yet *a court cannot ignore the fact that the grain elevators in this state cannot be operated in any other manner.* If the proprietor of an

elevator should be required to store each farmer's grain in a separate bin, and for failure to do so should be held liable for a loss of the grain by fire, the business of storing grain in elevators would practically cease."

Arthur vs. C., R. I. & P. Ry. Co., 61 Iowa, 648.

Numerous other cases in Iowa illustrate like questions which arise from the use of elevators built by third parties for receiving and shipping grain over railways.

Irons vs. Kentner, 51 Iowa, 90;
Johnson vs. Brown, 37 Iowa, 200;
Nelson vs. Brown, 44 Iowa, 455;
Marks vs. Cass County Elevator Co., 43 Ia., 146;
Cathcart vs. Snow, 64 Iowa, 584;
Sexton vs. Graham, 53 Iowa, 181;
Nelson vs. Brown & Doty, 53 Iowa, 555.

Undoubtedly the courts must take notice of this widespread condition of affairs, and of this method on the part of railway companies of compelling their patrons to furnish their own facilities. In a case where very similar questions were involved, it was said, by this court, opinion by Mr. Justice Blatchford:

"*We cannot close our eyes to the well known course of business in the country over very many of our railroads.* The contracts for transportation of goods are made, *not with the owners of the roads, nor with the railroad companies themselves*, but with transportation agencies, or companies which have arrangements with the railway companies for carriage. *In this manner some of the responsibilties of common carriers are often sought to be evaded, but in vain.* Public policy demands that the right of the owners to *absolute security against the negligence of the carrier, or of persons engaged in performing the carrier's duty*, should not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company."

Bank of Ky. vs. Adams Ex. Co., 93 U. S., 181.

Other decisions of this court are to the effect that it will take judicial notice of the wide spread course of business and trade involved in these practices by railway companies. Thus, it has been held that:

It will take notice of whatever is generally known within the limits of its jurisdiction.

Brown vs. Piper, 91 U. S., 37;
Phillips vs. Detroit, 111 U. S., 604;
King vs. Gallun, 109 U. S., 99;
Terhune vs. Phillips, 99 U. S., 592.

It will take judicial notice of the fact that it is the usual course

of trade to make advancements in New York upon the purchase of agricultural products in Ft. Wayne, Indiana, on the transfer of evidences of title, such as warehouse receipts. Such is

"*The usual course of the great inland commerce by which the larger part of the agricultural products of the valley of the Mississippi find their way to a market.* It has existed long enough to assume a regular form of dealing; and it embraces such a wide extent of territory, and is of such general importance that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them as it judicially recognizes the general and established usages of trade on the ocean."

Gibson vs. Stevens, 8 Howard, 399.

This language of Chief Justice Taney aptly describes the situation in the case at bar, and the widespread and general usage and custom involved in the questions which it presents for solution.

II.

IMPORTANCE OF QUESTIONS INVOLVED. UNCERTAINTY IN DECISIONS.

Obviously the questions involved are of great magnitude and importance; they will arise in many different jurisdictions, and will ultimately be presented for decision by most, if not all the Circuit Courts of Appeal.

That two cases should have arisen in Iowa on two different lines of railway, one presenting the case of an elevator, and the other of a cold storage warehouse, show how quickly the railways will generally adopt this device for screening themselves from liability for their own negligence, in dealing with an immense mass of commerce, brought upon their lines for shipment by the use of warehouse facilities, which it is clearly their duty to furnish for themselves.

The decisions, as they now stand, are in a state of grave uncertainty and doubt. The final decision of the Supreme Court of Iowa in the Griswold case was made, as appears from the reported decision, February 3, 1894, after this case was removed by defendant in error from the state into the federal court.

Griswold vs. Ill. Central Ry. Co., 57 N. W. Rep., 843.

The original decision in that case was made October 19, 1892, and held the condition in the lease exempting the railway company from liability for negligence, to be contrary to public policy, and void.

Griswold vs. Ill. Central Ry. Co., 53 N. W. Rep., 295.

No doubt, as suggested by Judge Caldwell (Record 51), it was to escape from this first decision of the Supreme Court of Iowa, that

the defendant in error removed this action into the Federal court. It seems clear, upon the authorities which will presently be cited in this brief, that under such circumstances the final decision of the Supreme Court of Iowa on the questions involved, is not controlling in the Federal courts.

But this is not all. The final decision in the Griswold case was by a divided court. Three of the judges, a bare majority, united in recalling and overruling the original decision, while two of the judges united in a dissenting opinion of great force, which it is submitted still sets forth the correct rule of law applicable to the questions involved. In this dissenting opinion it is said:

"Railway corporations are quasi public agencies and perform a public duty. They are agencies created by the state with certain privileges and subject to certain obligations. A contract that they will not discharge their obligations is a breach of public duty and cannot be enforced Ry. Co. vs. Ryan, 11 Kas., 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void as against public policy. Thomas vs. R. R. Co., 101 U. S., 71. Among the obligations imposed upon a railway corporation, is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the dilligence and care with which it furnishes and operates its road is to that extent against public policy."

Then, speaking of the lease, it is said: "*It is clear that its purpose on the part of the defendant* (railway company) *was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement.* Elevators, coal sheds and lumber yards are important aids to a railway engaged in carrying grain, coal and lumber, in securing and transacting that branch of its business. * * * * In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided to the extent to which it patronized them."

Griswold vs. Ry. Co., 57 N. W. Rep., 847.

It was along this line of reasoning that the railway was originally held liable. Although overruled on the final decision by a bare majority of the court, the force and cogency of this reasoning is nonetheless undeniable.

CONFLICT OF OPINION AMONG FEDERAL JUDGES.

A like conflict of opinion will be found among the learned and distinguished judges who passed upon the questions involved in this case in the court below.

His Honor, Judge Shiras, who decided the case at circuit, held in his opinion on the demurrer, that he was bound by the final decision of the state court in the Griswold case; that even if a contract of this character when made would be invalid under the decisions of the state courts, but was valid by reason of a change in such decisions at the time it was sought to be enforced, the Federal courts would follow the last decision and enforce such contract; referring to the Griswold case, in the last sentence of his opinion, he says: "And, relying upon that decision, I hold that the contract contained in the lease to Simpson, McIntire & Co., exempting the defendant company from liability for fire is not NOW contrary to the public policy of the state of Iowa, and hence is not invalid." (Record 28).

In the Court of Appeals, Judge Caldwell refused to join in the affirmance of the judgment below, except upon the express ground that the Federal courts were bound by the decision in the Griswold case. As to the validity of the exemption in the lease as an original proposition, he said, in the last clause of his dissenting opinion: "*The question as presented by this record is not free from doubt* It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case." (Record 51).

Judges Sanborn and Thayer held that they were not bound by the decision in the Griswold case, but sustained the exemption from liability for negligence contained in the lease as the same was specially set up by the defendant in error. This conclusion was arrived at upon the ground substantially, that the defendant in error:

"Was apparently willing to discharge all the duties it owed to the public, and to every individual of the public, and it did not undertake by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right-of-way to these lessees or to anyone else, nor had they or any one any right to the use of the leased premises before this lease was made." (Record, 46.)

"But the law imposes no duty upon a railroad company to lease its right of way or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission." (Record, 47.)

"But the defendant in error and Simpson, McIntire & Co. did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees caused by fire, set by the negligence of the company, relieved the company from no duty it was required by law to perform, but simply provided that it should not

assume an additional burden which it had the option to take or to refuse." (Record, 48.)

"There is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Co. to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid." (Record, 48.)

It is respectfully submitted that this line of reasoning does not dispose of the real questions involved. A railway company having failed to furnish needed stational facilities in the form of warehouses and elevators, and having thus compelled its patrons to furnish them under what is in form a lease, but in reality a mere license, should hardly be permitted to deny that it was either bound to furnish them for itself, or through its patrons and the public.

Neither do its patrons stand upon an equal footing with the railway company. While it is true that the company has no monopoly of land in Iowa, yet a warehouse or elevator, in order to furnish the requisite facilities and conveniences to the public which the railway company ought to furnish, must be located upon the right-of-way of the railway company, or so nearly adjacent thereto that it may be reached by a spur track or side track. Now if a patron should erect such a warehouse or elevator upon his own ground immediately adjoining the station grounds of the railway, the latter might still refuse to build or even operate a spur track or side track with reference to such elevator or warehouse, unless it was exempted from liability for burning the same and its contents by negligence, by a provision in a contract precisely similar to that inserted in the lease in controversy.

Thus it will be seen that the patrons of railways have no real freedom of choice in these matters. They must have elevators and cold storage warehouses somewhere in order to carry on a vast volume of commerce over the railways. These facilities when furnished by themselves will still be of no practical use or benefit unless the railway tracks are laid down to and past them. The railways may refuse such tracks unless exempted from liability for their own negligence in operating them. Wherever, therefore, the patron builds these warehouses, whether on his own grounds or on the grounds of the railway company, he may still be compelled to submit to the conditions contained in these leases, or he cannot secure side tracks from any common carrier or any railway company anywhere. What freedom of choice has the shipper or the public in dealing with railway companies under such circumstances?

How can it fairly be said that this course of proceeding has "relieved the company from no duty it was required by law to perform, but simply provided that it should not assume an additional burden which it had the option to take or refuse." In reason and justice it

should not have the option to take or refuse the responsibility of furnishing these stational facilities in some form; nor of being exempt from liability for negligence and carelessness in destroying them and their contents after refusing to furnish them itself.

If, as held by the Court of Appeals, the railway company may employ others to furnish warehouses and elevators, and stipulate that such others shall hold the companies harmless from any damage to such property and contents, from fires caused by the negligent operation of the railroad, then all that a company will need to do, will be to have some pecuniarily irresponsible employe furnish warehouses in form, which it may build itself in fact, and thus escape from all duty and obligation to exercise diligence not to destroy the property of its patrons therein for shipment, or for delivery to a consignee.

These questions are of such manifest magnitude and importance to all shippers by railway everywhere, that it is respectfully submitted they should receive a more authoritative solution and determination than can be gathered from the conflicting decisions of the Supreme Court of Iowa, and the conflict in opinion among the very able and learned judges who took part in the decisions of this cause in the courts below.

III.

DECISION OF COURT OF APPEALS NOT IN HARMONY WITH DECISIONS OF THIS COURT.

It is, perhaps, too much to say that the decision of the Court of Appeals is in conflict with the decisions of this court. The precise questions now involved have not been decided or passed upon here. Indeed, they are practically new questions.

But it is submitted that the decision below is not consistent, nor in harmony with the decisions of this court upon questions of substantially the same character. This court has repeatedly held that it is contrary to public policy to allow railway companies to stipulate for exemption from injuries or destruction of property caused by their own negligence, even in cases where decisions of the courts of the states in which the contracts were made held such exemptions valid.

R. R. Co. vs. Lockwood, 17 Wallace, 357;
Express Co. vs. Caldwell, 21 Wallace, 264;
Liverpool Steam Co. vs. Phenix Co., 129 U. S., 397;
York Co. vs. Central R. R., 3 Wallace, 107;
Express Co. vs. Kountz Bros., 8 Wallace, 342;
Hart vs. Pa. Ry. Co., 112 U. S., 338.

It is true that a railway company may make a valid stipulation that it shall be entitled to the benefit of any insurance which there may be upon property transported by it, and which is destroyed by its own negligence.

Providence Ins. Co. vs. Morse, 150 U. S., 99;
Phoenix Ins. Co. vs. Western Transportation Co., 117 U. S., 312.

But a railway company cannot make a valid stipulation which will *compel a shipper* to secure such insurance for its benefit, and thus indemnify itself against its own carelessness at the shipper's expense.

"The question raised is, will the courts compel the performance of a contract between shipper and carrier *requiring the shipper to protect the carrier against the consequences of its own negligence?* There is no doubt about the carrier's having an insurable interest in the goods, or about his right to protect himself from loss by procuring a policy of insurance for that purpose; but the question here presented is, *can he compel the shipper to insure the goods for his benefit?* If so, he can compel the shipper to release him entirely and so stipulate for complete immunity from the consequences of the negligence and fraud of himself or of his servants and employes. *This in the language of the English courts would be unjust and unreasonable. In the language of our own cases it would be contrary to public policy.*"

Willock vs. Pa. Ry. Co., 166 Pa. St., 192.

The decisions of this court are clearly to the effect that no general release in advance, of liability for tortious acts which may occur in the future, is valid or will be upheld.

Ins. Co. vs. Morse, 29 Wallace, 451;
Teal vs. Walker, 111 U. S., 252.

It is believed that the result of this line of decisions must be to hold the exemption relied upon by the defendant in error to be unreasonable, contrary to public policy, and void.

IV.

FEDERAL COURTS NOT BOUND BY DECISION IN GRISWOLD CASE.

It is well settled that where the jurisdiction of the Federal courts has already been invoked in a pending litigation, those courts are not bound by any decisions of the state courts made during the pendency of such litigation.

Burgess vs. Seligman, 107 U. S., 20;
Clark vs. Bever, 139 U. S., 116;
Carroll County vs. Smith, 111 U. S., 562.

And it is also true as to rights which accrued before the decisions of the state courts, and as to all questions of general jurisprudence as contra-distinguished from strictly local law, that the Federal courts are not bound by the decisions of the state courts.

Anderson vs. Santa Anna, 116 U. S., 365;
Bowles vs. Brimfield, 120 U. S., 762;
Ry. Co. vs. Doe, 114 U. S., 352;
Liverpool Co. vs. Phenix Co., 129 U. S., 443;
Ry. Co. vs. Lockwood, 17 Wallace, 368;
Delmas vs. Insurance Co., 14 Wallace, 667.

And see also decisions cited in opinion of Court of Appeals on this question, Record p. 45.

Federal courts will not follow a decision of state courts holding an attempted exemption of a telegraph company from liability for its negligence, to be valid.

Western Union Tel. Co. vs. Cook, 9 C. C. A., 684.

No doubt, as suggested by Judge Caldwell in his opinion, "It was the hope that this court would overrule the decisions of the Supreme Court of Iowa in a similar case that caused the removal of this case into the circuit court," *by the defendant in error*. In other words, the defendant in error was then seeking to escape from the first decision of the Iowa Supreme Court in the Griswold case, and it cannot now invoke as binding upon the Federal courts, the final decision in that case, made while this litigation was pending in the tribunal into which it had removed it.

V.

ATTEMPTS TO EXEMPT FROM LIABILITY FOR NEGLIGENCE GENERALLY HELD CONTRARY TO PUBLIC POLICY AND VOID.

Telegraph companies are not common carriers, but cannot by contract exempt themselves from liability for their own negligence.

Western Union Tel. Co. vs. Cook, 9 C. C. A., 684;
Adams Ex. Co. vs. Caldwell, 21 Wallace, 269;
Grinnell vs. Western Union Tel. Co., 113 Mass., 301;
Thompson vs. Tel. Co., 64 Wis., 531;
Harkness vs. Tel. Co., 73 Ia., 190;
Smith vs. Western Union Co., (Ky.), 8 A. & E. Corp. cases, 13.

Judge Gresham at circuit applied the same doctrine to a contract between a private employer and his servant.

Roesner vs. Herman, 10 Biss., 486.

And railway companies may not contract for the right to injure their servants through negligence.

K. P. Ry. Co. vs. Keely, 29 Kas., 169;
Little Rock Ry. Co. vs. Eubanks, 48 Ark., 460;

Ry. Co. vs. Spangler, 44 Ohio St., 476.

Sleeping and parlor car companies are not liable as common carriers nor as innkeepers, yet they must exercise due diligence in protecting both passengers and their property.

Hutchinson on Carriers, 2 Ed. by Mechem, Sec. 1617 d. to 1618 k., and authorities there cited.

A railway company cannot contract for exemption from liability for a personal injury inflicted through its negligence upon one employed by an independent contractor engaged in building its line of road.

Johnson vs. Ry. Co. (Va.) 11 S. E. Rep., 829.

Public policy should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct.

Cooley on Torts, 687;
Bishop on Non-Contract Law, p. 1074;
Bishop on Contracts, Sec. 549.

PUBLIC POLICY AS TO FIRES GENERALLY.

Aside from the immediate duty which railway companies owe to their patrons not to destroy their property in the form of warehouses which they are compelled to build for themselves, or goods whether in transit or in process of being placed in transit, or stored in warehouses after the shipment is completed, there is a uniform and universal public policy against permitting the negligent setting out and escape of fires.

No agency is more dangerous. To set fire to warehouses at railway stations is frequently to imperil many lives, and the property of entire communities.

Throughout the entire land will be found a code of laws and police regulations establishing paid fire companies, or authorizing volunteer fire companies, and taxing cities and towns for water works, the better to fight and repress this dangerous agency.

Are all safeguards of this character to be nullified by authorizing contracts which reserve the right to negligently set fire to business property in business communities?

If a railway company may reserve this right, a manufacturing company may reserve or acquire it as to adjacent property. So electric light companies may reserve the right to set fire to and burn up whole cities or towns by the negligent and careless use of electricity.

Railways are especially subject to police regulations against fires.

M. & St. L. Ry. Co. vs. Terry, 127 U. S., 210;
Northern Pacific Ry. Co. vs. Mackey, 127 U. S., 205.

If a state were to contract with a railway company that it might

build a line of railway through its borders with no liability for fires negligently set out by it, such contract would undoubtedly be void. At any rate, it might be repudiated at any time by the legislature by laws passed in the exercise of the police power, entailing a liability for such negligence, in order to protect the public "in particulars essential to the preservation of the community from injury."

N. Y. & N. E. Ry. Co. vs. Bristol, 151 U. S., 567.

The statutes of Iowa make railway companies "liable for all damages by fire that is set out or caused by the operation of any such railway."

Code of Iowa, Sec. 1972.

The railway companies are liable for all fires set by them unless they can prove affirmatively the almost impossible thing that they were guilty of no negligence causing or contributing to such fires.

"The presumptions of the case devolve upon the defendant the burden of showing the negative of such facts, or at least, to negative the inference of negligence arising therefrom. It may be thought that the rule *devolves upon railway companies nearly, if not quite, an impossibility of proof in such cases, but that fact cannot change the result.*"

Greenfield vs. C. & N. W. Ry. Co., 83 Ia., 274;
Small vs. Ry. Co., 50 Ia., 338.

In such cases contributory negligence is no defense, nor is it necessary to charge or prove negligence on the part of the railway company in order to recover, if the fire is actually set by it.

West vs. Ry. Co., 77 Iowa, 655;
Engle vs. Ry. Co., 77 Iowa, 661;
Babcock vs. Ry. Co., 62 Iowa, 513.

In addition to this the statutes of Iowa, as elsewhere, bristle with legislation designed to protect the public against the setting out or spread of fires. It is unnecessary to quote these statutes, they exist everywhere in nearly the same form and establish a universal public policy for the protection of the public against fires.

The contract assailed in this litigation tends to defeat this public policy by reserving the right to set out fires negligently and by offering a premium to this extent for starting conflagrations, the destructive effect of which nobody can foresee or guard against.

In any view of the case it is respectfully submitted that the exemption from liability put into its lease by defendant in error, is contrary to public policy and void, and that the writ of certiorari ought to issue as prayed.

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